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No. 09-1453

Supreme Court, U.S.
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In The

Supreme Court of the United States

MARGIE R. GEORGE,

Petitioner,

v.

CITY OF MORRO BAY; DAVID R. HUNT; PHILIP F. SINCO; WILLIAM YATES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI

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2 *Norton Bankruptcy Law and Practice* § 46:57 (3d ed. 2008) 3

PRELIMINARY STATEMENT

The Petitioner, Margie R. George, respectfully submits this Supplemental Brief to address the City's failure to respond to the Petition for Certiorari, and to apprise this Court of cases relevant to the issues presented that have become available after the petition was filed.

THE CITY'S FAILURE TO RESPOND TO THE PETITION FOR CERTIORARI

A brief in opposition to a petition is not mandatory. However, Rule 15.2 of this Court admonishes Counsel that they have an obligation to the Court to bring to the Court's attention any perceived misstatements in the petition.

The petition clearly states that the City took Petitioner's property, and in so doing, violated not only the Fifth Amendment to the Constitution but the Automatic Stay and Discharge provisions of the Bankruptcy Code as well.

Respondents failure to advise this Court of any misstatement of fact or law amounts to an admission that Petitioner's position on the issues presented are true and correct and that this Court needs to address these issues to prevent further Constitutional violations.

Respondents cannot deny any points of law or facts raised in the petition or offer any argument as

to why this Court should not grant this Petition for Certiorari.

Because this Court has held that violations of the automatic stay are void, should this Court decline to grant this petition, the Court should at least remand this case to the district court to provide the Petitioner a remedy for those violations.

RECENTLY DECIDED CASES RELEVANT TO THE ISSUES PRESENTED

A. Cases Involving A "Taking" Under The Fifth Amendment

This Court's recent decision in *Stop The Beach Renourishment, Inc. v. Florida Department of Environmental Protections,* 130 S. Ct. 2592 (2010) advances the theory that "[I]f a legislature *or a court* declares that what once was an established right of private property no longer exists, it has taken that property no less than if the State had physically appropriated it. . . ." *id.* at 2602 (emphasis in original). This is precisely the issue presented in the petition that where a court orders that a person must surrender their property pursuant to 11 U.S.C. § 365(d)(4), that statute "as applied" constitutes a taking without compensation of a debtor's property.

B. Cases Involving "Rejection" Under 11 U.S.C. § 365(d)(4)

The Honorable Jeffrey R. Hughes, United States Bankruptcy Judge in the Western District of Michigan has expressed the need for this Court to reexamine what is now meant by the term "rejection". See *In re Lucre, Inc.* 2010 Bankr. *LEXIS* 2336 at *74 (Bkrtcy. W.D. Mich. July 20, 2010).

In re Silver Fox, LLC, 2010 Bankr. *LEXIS* 2066 at *14 (Bkrtcy. D. N.J. July 24, 2010) states that in a Chapter 11 case, where a debtor has neither assumed nor rejected a lease under § 365, that lease will be unaffected by the bankruptcy filing under the "ride through" doctrine.

In re Exide Technologies, 607 F.3d 957 (3d Cir. 2010) adds even more confusion to the meaning of "rejection". The court held that because the contract was not executory, Exide could not reject it. Thus, if a contract cannot be rejected, what is its status in the bankruptcy proceeding? The Honorable Judge Ambro, Circuit Judge, wrote separately, quoting 2 *Norton Bankruptcy Law and Practice* § 46:57 (3d ed. 2008) as finding that "[T]he Bankruptcy Code instructs us that rejection is a breach of the executory contract. It is not avoidance, rescission, or termination."

In *In re GCP CT School Acquisition, LLC,* 429 B.R. 817 (1st Cir. BAP, 2010) the Panel held that if a trustee failed to assume a lease within 120 days after

the entry of the order for relief, the lease is rejected and the trustee must *immediately surrender* the leasehold to the lessor.

In the case of *In re The Deli Den, LLC*, 425 B.R. 725, at 727 (Bkrtcy. S.D. Fla. 2010) the Court held that neither an adversary proceeding nor relief from the automatic stay were required to implement § 365(d)(4) and ordered the lessee to surrender the leasehold and vacate the premises although the lease was "unexpired". The bankruptcy court in *In re Jim Slemons Hawaii, Inc.*, No. 09-01802, 2010 WL 691499 (Bkrtcy. D. Hawaii Feb. 22, 2010) reached the same conclusion and ordered that Slemons had to surrender the premises to the lessor, thereby depriving the estate of a valuable asset although there were nine years left on the unexpired lease.[1] These two Courts thereby effectively nullified § 362(b)(10) and § 541(b)(2).

[1] Although this case and *In re Deli Den, Inc.* pre-date the Petition for Certiorari, Petitioner did not become aware of them until recently. They are offered to this Court to show how pervasive such orders are and that most cases under § 365(d)(4) are never published.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MARGIE R. GEORGE